Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 01-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2001

KAY SADAO KATO, *et al*,
Petitioners,
vs.
UNITED STATES, *et al*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In deciding the accrual date of a federal tort, for the purposes of a statute of limitations challenge, the court may rely upon the doctrine of the "ongoing tort," or "continuing tort". The claim is timely, even in a case where some of the litigated conduct has occurred outside the limitations period, if one or more wrongful acts were committed pursuant to a defendant entity's official policy of discrimination, which continues into the limitations period.

This case presents the question of whether, in a discrimination claim against a federal agency, the claimant must also allege an *additional* continuing relationship between the claimant and defendant -- in addition, that is, to continuing membership in a class, targeted by a continuing policy of discrimination -- in order to rely upon the doctrine of ongoing tort accrual when defending the timeliness of the claim.

LIST OF PARTIES

Mr. Kay Sadao Kato, 91 years old when the complaint was filed, is a resident of Los Angeles (hereafter, "Mr. Kato"). Ms. Jane Natsue Yano, 52 years old when the complaint was filed, is a resident of Santa Clara, California (hereafter, "Ms. Yano"). The remaining petitioners, Makoto Ogura, Shizue Ogura, Kenjiro Ogura, and Yasuo Ogura (Okui), are Japanese citizens, also of Japanese descent (hereafter, "the Ogura Family.")

Petitioners were among those persons of Japanese descent subjected on the basis of their race and national origin, by the United States, to unlawful internment pursuant to a series of executive orders issued at the outset of World War II.

Respondent is the United States, defendant and appellee in the courts below.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2001

KAY S. KATO, *et al*,
Petitioners,
vs.
UNITED STATES,
Respondent.

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals which was ordered not suitable for publication.

CITATIONS TO THE UNPUBLISHED OPINIONS AND ORDERS BELOW

United States District Court for the Central District of California Case No. CV 99-10719

United States Court of Appeals for the Ninth Circuit Case No. 00-55673

U.S. Department of Justice Immigration & Naturalization Service, Office of the Regional Counsel, Western Regional Office, Response to Notice of Tort Claim of Jane Natsue Yano, File No. WRCOU 90/1-99.127.

BASIS FOR JURISDICTION IN THIS COURT

The judgment and opinion of the Ninth Circuit Court of Appeals in Kato v. United States was filed on January 3, 2001. A timely petition for rehearing was denied on March 28, 2001. This Court's jurisdiction is

invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 USC section 2401 (b)

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

50 USC App. section 1989

The purposes of this Act [sections 1989 to 1989d of this Appendix] are to–

(1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;

(2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens;

...

(7) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.

50 USC App. section 1989a(a)

The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.

STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction in the Court of First Instance

The United States District Court for the Central District of California had jurisdiction over petitioners' claims pursuant to Article III, Section 2 of the United States Constitution (authority to adjudicate disputes arising under the Constitution or laws of the U.S. and its treaties with other nations); 28 U.S.C. section 1331 (same); 28 U.S.C. section 1343(2) (authority to adjudicate actions brought under 42 U.S.C. section 1985) and 1343(4) (authority to adjudicate any action brought under a federal civil rights statute); and 28 U.S.C. section 1346(b) (authority to adjudicate liability of United States for acts rendering a private person liable under the law of the place where the act occurred). The right to this private action arose under 42 U.S.C. §§1981 and 1985, and the Federal Tort Claims Act (28 U.S.C. §§1346(b) and 2671 et seq.).

B. Facts of the Case

These joined cases arise in part from some of the most troubling events in United States history during the 20th Century: the unlawful imprisonment of thousands of families, on the basis of their race, during World War II, and the government's prolonged efforts to avoid accountability for those acts.

Still unknown to many Americans is the fact that, in addition to the U.S. citizen families of Japanese descent who were arrested, imprisoned, and relocated, in what has been described as "one of the strange, unhappy, largely forgotten stories of World War II," the

U.S. also seized and transported some 2,200 Japanese men, women, and children, to the United States, from neutral foreign countries, for use as exchange hostages.1/

Although the justification then given was the wartime threat of subversive acts by suspected enemy agents, one of the U.S. officials in charge later stated there had never been evidence of such a threat that might justify the abduction and imprisonment of these families, without hearings, on the basis of their Japanese descent, and foreign citizenship.2/

Documents identifying their neutral citizenship were by confiscated during their transport aboard U.S. military vessels to the United States. Upon arrival, they were classified by the Immigration and Naturalization Service as immigrants who had unlawfully penetrated the United States' borders.3/ Classified as stateless members of an enemy race -- "enemy aliens" -- they were subject to the interests of

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[1]Personal Justice Denied, Report to the 102d Congress by the Commission on Wartime Relocation and Internment of Civilians, Appendix: Latin Americans, March, 1992, Library of Congress Catalog Card Number 82-600664 ("Justice Denied"), at 314. Appendix ("Apx") at 11.

[2]Justice Denied at 308, Apx at 16 ("Normal legal proceedings were ignored"); at 309, Apx at 18 ("the United States was unwilling to investigate the need to deport each individual ... These considerable numbers [of Americans held overseas] increased American interest in receiving Japanese deportees from Latin America").

[3]Justice Denied at 308, Apx at 17 ("In most cases passports had been confiscated before landing ... Despite their involuntary arrival, deportees were treated by INS as having illegally entered this country.")

the federal government. 4/

These facts are difficult to credit when first heard. Yet all of them ultimately were admitted by the United States Following 30 or more years of deception about the wartime internments of Japanese families, historians and investigators gathered the evidence of the government's policies. A Congressional review followed. The unlikely stories proved to be historical fact: the United States had deliberately committed a massive program of rights violations during the war, and the United States deliberately concealed these acts after the war. Most disturbing was the appearance of hypocrisy, given that during World War II, and the subsequent Cold War, our country relied on its claim to a commitment to equal rights for support in those struggles from other nations. Much was made of the ultimate acknowledgment by the United States Congress to the surviving internees. 50 USC App. §1989. Appellants, however, were subsequently excluded by the defendant's United States Attorney from that apology, and assert that there are additional, unlikely-seeming acts, for which the United States continues to avoid accountability. Their claim is that, while advertising a renunciation of the prior conduct, the United States continued to follow the same official policy of discrimination and concealment, in its conduct toward them. These are extraordinary claims. Hardly more so, perhaps, than the historical, admitted fact that our country abducted and imprisoned, then traded as hostages, these Japanese families from other countries. Yet investigation by a bi-partisan committee

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[4]Justice Denied at 308, Apx at 17 ("Thus the deportees became illegal aliens in U.S. custody who were subject to deportation proceedings.")

of the United States Congress, established these facts as true. Justice Denied, Apx at 11. Hardly more so, perhaps, than the fact that for thirty years after the War, our government preserved that policy for future possible use, by maintaining the false position that wartime necessity, not racism, had been the motivation. Again, the Congress, and published federal court findings, have acknowledged and published the truth of those unlikely facts as well. 50 USC App. Section 1989a(a); Hohri v. United States of America, 586 F.Supp. 769 (D.C.D.C. 1984) 774-776. Just as the earlier truths were, these claims, on first hearing, may be difficult to accept.

Their truth, however, is not at issue. These facts were alleged in the petitioners' notices of tort claim, and again, repeatedly in their complaint. The United States Attorney made reference to them in her dismissal motion reply. Yet, neither the District Court, nor the Ninth Circuit Court, found any basis for a dispute of these claims. This was a Federal Rules of Civil Procedure Rule 12 dismissal, not a summary judgment dismissal, and the petitioners' timely request for discovery, in the event these facts were in dispute, was not granted. The courts below treated as accepted fact, not materially disputed by the United States Attorney, that the claimants had been wrongly imprisoned on the basis of their race. More importantly, however, the United States did not dispute, and the courts below accepted as true that the official policy of discrimination was a continuing policy from the time of the imprisonments, until shortly before these complaints were filed, and certainly well

into the limitations period.5/

These cases were dismissed below on the basis that the United States has admitted abducting and imprisoning the petitioners on the basis of their race and national origin, and that the admission is truthful and accurate. These cases were dismissed on the basis that those unlawful acts were pursuant to an official government policy of discrimination against persons of petitioners' race and class, and that the policy was maintained into the limitations period. That aspect of the case cannot be disputed before this Court. Whatever may be their legal consequences, those are the extraordinary facts this case offers for consideration by the Court. Whether their extraordinary nature offers an opportunity to resolve legal principles by application to particularly striking facts, or disqualifies them for review, is, of course, the subject of this brief.

It is not disputed, then, that the defendant's official policy of discrimination remained in effect at least until December 12, 1999. Each of the petitioners filed a notice of tort claim, as required by the Federal Tort Claims Act, within 1 year of that date. Each of the petitioners also subsequently filed an action in the district court, as required by the Act, within 6 months of the respondent's denials of their claims.

On, respondent moved for dismissal pursuant to

5/The respondents' decision cannot be explained simply as a matter of not bothering to deny a facially implausible allegation. The formerly implausible fact that the United States engaged in a policy of unlawful deception as to the internments, for a period of decades, is now accepted as historical truth. See Hohri v. United States, 847 F.2d 779 (Fed.Cir. 1988). The allegation of a continuing policy is, after all, hardly less plausible than the proved and admitted fact of the original seizures and internments of hostage families by the United States.

Rule 12, arguing that all claims were barred by the statute of limitations. In opposition, the petitioners noted that the United States did not dispute the fact of a continuing official policy of discrimination, but also requested discovery, and oral argument at the hearing. The District Court did not grant the discovery request, and denied oral argument. On April 4, 2000, the District Court entered an order of dismissal, without issuing a memorandum of reasoning or findings.6/

Petitioners timely appealed. On January 3, 2001, the Ninth Circuit affirmed, holding that the petitioners had failed to allege a claim-related relationship with the defendants, subsequent to their internment. Accordingly, the doctrine of continuing tort accrual did not apply, and the actions were barred by the statute of limitations.

The petitioners timely filed a petition for rehearing, arguing that the principle relied on in the Ninth Circuit court's opinion was inconsistent with its prior published opinions. "[E]ach class member must demonstrate, by fact of employment or otherwise, that he or she had been discriminated against during the limitation period or was a member of a group exposed to discrimination during that time." Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. Wash. 1984) (emphasis added); Independent Housing v. Fillmore Center Associates, 840 F. Supp. 1328 (N.D.Cal. 1993)(liability to non-resident claimants for disability discrimination in housing construction.); Schonfield v. City of Carlsbad, 978 F. Supp. 1329, 7 Am. Disabilities Cas. (BNA) 673 (S.D.Cal. 1997) (same).

6/The significance of these facts, beyond mere disappointment to the petitioners, is explained below under the heading of "Reasons for Granting the Writ."

Rehearing was denied on March 28, 2001.

The Ninth Circuit, in affirming, reasoned that the violations of the petitioners' rights -- including abduction from their native country, dissolution of citizenship, extended captivity for use as hostages, and deportation to yet a third country -- although committed pursuant to a continuing, official government policy of racial discrimination -- was insufficient to establish an ongoing tort. The Ninth Circuit held that such a continuing official policy of human rights violations on the basis of race was not enough to preserve liability. Only continued internment, or its equivalent, would have sufficed.

The error of that conclusion may be too self-evident to justify Supreme Court review, particularly in an isolated, unpublished decision. Chung v. Pomona Valley Community Hospital, 667 F.2d 788 (9th Cir. 1982) (federal continuing violation rule applicable to claims, under this section, that borrow state law to set limitation period); Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1480 (9th Cir.1989) (continuing policy constitutes continuing violation). Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982) (reversing finding of statute of limitations defense against Section 1981 plaintiffs alleging company policy of employment discrimination) (emphasis added); Alexander v. Local 496, Laborers Intern. Union of North America, 860 F.Supp. 410 (N.D. Oh. 1994) (action timely filed within two years of date discriminatory policy was last in effect); Gutowsky v. County of Placer, 108 F.3d 256, 259 (9th Cir. 1997); Reed v. Lockheed Aircraft Corp., 613 F.2d 757 (9th Cir. 1980). Petitioners respectfully submit, however, that with their own personal interests out of consideration, the issues raised by the defendant's motion, bypassed

by the lower courts' erroneous rulings, are pressing, and may be very usefully resolved in this case.

REASONS FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE SUMMARY PROCEEDINGS AND OPINION BELOW HAVE BYPASSED CONSIDERATION OF A SIGNIFICANT FEDERAL QUESTION OF INTERNATIONAL HUMAN RIGHTS.

The United States Federal Courts have, in recent years, become a preferred forum for the resolution of international law disputes, particularly of human rights disputes. William Glaberson, "U.S. Courts Become Arbiters of Global Rights and Wrongs, THE NEW YORK TIMES, June 21, 2001, Apx at 11. The value of that role to the aim of disseminating the values and methods of the United States Constitution, and the United States judicial system, both to the United States, and to other countries, cannot be overstated, and may, perhaps, be partially measured by the efforts by other nations to compete for this position of leadership. "Other countries are already trying to expand the influence of their legal rules or to fight off the influence of America's legal system. Some European countries are resisting a proposed international agreement in The Hague that would make it easier to enforce judgments of American courts abroad." Apx at 36.

That the pre-eminence of the United States as an arbiter or critic of human rights disputes may be adversely impacted by a perception of its own abuses or neglect, particularly in this area, has been

acknowledged by the Congress. "The purposes of this Act [sections 1989 to 1989d of this Appendix] are to–... (7) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations. 50 USC App. section 1989. Petitioners' claims, summarily disposed of by the courts below, are not invisible to the rest of the world. Jessica Garrison, "Six Sue U.S., Seek Redress for WWII Internment," LOS ANGELES TIMES, January 7, 2000; Apx at 11.

The factual issue, of whether the United States Government has maintained a policy of racial discrimination, may be addressed according to the fair and efficient rules of our courts, and an authoritative conclusion reached. Or it may be addressed and resolved outside of the United States, in the courts of another nation, or in the press.

The judicial bypass of an investigation under the United States' rules of evidence and procedure, through a summary ruling, without oral argument, and without an explanation of the trial court's findings or reasoning, disserves the international authority of the United States and its courts. The affirmance of that bypass by an anomalous appellate ruling also fails to enhance that authority.

CONCLUSION

These cases, and the international human rights issues they raise, are of substantial national importance. The petitioners respectfully request the grant of their petition for a writ of certiorari to the Supreme Court of the United States.

June 22, 2001 Respectfully submitted,

LAW OFFICES PAUL L. MILLS

By: _____

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Makoto Ogura, Shizue Ogura,
Kenjiro Ogura, and
Yasuo Ogura (Okui)

No. 01-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2001

KAY SADAO KATO, *et al*,
Petitioners,
vs.
UNITED STATES, *et al*,
Respondents.

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT
OF THE UNITED STATES

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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APPENDIX

Opinions, Orders, Findings of Fact
and Conclusions of Law
Rule 14.1(1)(1)

FILED
January 3, 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KAY KATO; JANE YANO; MAKOTO OGURA; SHIZUE OGURA; KENJIRO OGURA; YASUO OGURA, aka Yasuo Okui,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA

Defendant-Appellee

No. 00-55673
D.C. No. CV-99-10719-JSL (Ex)

MEMORANDUM

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit

except as may be provided by Ninth Circuit Rule 36.3.

Before: SCHROEDER, Chief Judge, NOONAN and W. FLETCHER, Circuit Judges.

The plaintiffs seek damages under the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 et seq., and 42 U.S.C. §§ 1981 and 1985 for their internment by the United States during the 1940s because of their Japanese ancestry. The complaint was filed in 1999, more than 50 years after the internment ceased. The district court dismissed, and plaintiffs appeal.

Plaintiffs contend that their claims are not barred by the relevant statutes of limitations because the government maintained a policy of invidious discrimination against persons of Japanese descent even after the internment, and that the government is therefore guilty of a continuing violation of their rights. The plaintiffs, however, have had no relationship with the United States government that is any way related to these claims since the internment ended, and the cases upon which plaintiffs rely are therefore inapposite. See, e.g., Gutowsky v. County of Placer, 108 F.3d 256 (9th Cir. 1997) (continuing violation for employee's entire term of employment was properly alleged where defendant county denied female clerical employee the opportunity to become a heavy equipment operator for the duration of the employment relationship).

We need not determine whether the merits of the plaintiffs' claims would fall within any statutory waiver of sovereign immunity.

AFFIRMED.

Other Opinions, Orders, Findings of Fact
and Conclusions of Law
[Rule 14.1(1)(ii)

FILED
CLERK, U.S. DISTRICT COURT
April 3, 2000
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
CLERK, U.S. DISTRICT COURT
April 4, 2000
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 99-10719 JSL
ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

KAY SADAO KATO, ET AL.
Plaintiffs,
v.
UNITED STATES OF AMERICA,
Defendant.

The motion of Defendant United States of America to dismiss was decided without hearing on March 31, 2000.

Having reviewed the papers filed in connection with this matter, and being fully apprised of the relevant facts and law,

IT IS HEREBY ORDERED that the motion of Defendant United States of America to dismiss be

GRANTED.
IT IS SO ORDERED.

DATED: 4/3/00

J. Spencer Letts
United States District Judge

U.S. Department of Justice
Immigration & Naturalization Service
Office of the Regional Counsel
Western Regional Office

24000 Avila Road
P.O. Box 30080
Laguna Niguel, CA 92607-0080

Refer to file no.
WRCOU 90/1-99.127

February 23, 1999

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CERTIFIED MAIL - RETURN RECEIPT REQUESTED

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The Equitable Building
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Los Angeles, CA 90010

Re: Claim against the Immigration and Naturalization Service; Client: Jane Natsue Yano

Dear Mr. Mills:

This office is in receipt of the Standard Form 95, Claim for Damage, Injury, or Death which you have filed regarding allegations of the claimant which arise from alleged incidents occurring from January 28, 1947 to August, 1947.

The instructions on the reverse side of the SF-95 state the following:

> The claim must be presented to the appropriate Federal Agency within two years after the claim accrues.
>
> *(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accured* [sic] *may render your claim "invalid". A claim is deemed presented when it is received by the appropriate agency, not when it is mailed.*

The claim was received at the Immigration & Naturalization Service in Laguna Niguel, California on

January 25, 1999. You have therefore failed to comply with the statute. Therefore your claim was filed too late for consideration. Your claim must be and hereby is denied.

Any recovery under the Federal Tort Claims Act must be predicated upon a showing of a negligent or wrongful act or omission of a federal government employee acting within the scope of his/her employment. 28 U.S.C. § 1346(b).

Sincerely,

Arthur E. Adams
Regional Counsel

Order on Rehearing
[Rule 14.1(1)(iii)

FILED
March 28, 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: SCHROEDER, Chief Judge, NOONAN and W. FLETCHER, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

Judgment Sought to Be Reviewed
[Rule 14.1(1)(iv)

LODGED
CLERK, U.S. DISTRICT COURT
April 13, 2000
CENTRAL DISTRICT OF CALIFORNIA

FILED
CLERK, U.S. DISTRICT COURT
April 16, 2000
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
CLERK, U.S. DISTRICT COURT
April 20, 2000
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-55673
CT/AG#: CV-99-10719-JSL (Ex)

KAY KATO; JANE YANO; MAKOTO OGURA; SHIZUE OGURA; KENJIRO OGURA; YASUO OGURA, aka Yasuo Okui,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA

Defendant-Appellee

APPEAL FROM the United State District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered 1/3/01

Other Appended Materials
[Rule 14.1(1(vi)

PERSONAL JUSTICE DENIED

REPORT OF THE
COMMISSION ON WARTIME RELOCATION
AND INTERNMENT OF CIVILIANS

WASHINGTON, D.C.
DECEMBER 1982

APPENDIX: LATIN AMERICANS

During World War II the United States expanded its internment program and national security investigations to Latin America on the basis of "military

necessity." On the government's invitation, approximately 3,000 residents of Latin America were deported to the United States for internment to secure the Western Hemisphere from internal threats and to supply exchanges for American citizens held by the Axis. Most of these deportees were citizens, or their families, of Japan, Germany and Italy. Although this program was not conducted pursuant to Executive Order 9066, an examination of the extraordinary program of interning aliens from Latin America in the United States completes the account of federal actions to detain and intern civilians of enemy or foreign nationality, particularly those of Japanese ancestry.

What began as a controlled, closely monitored deportation program to detain potentially dangerous diplomatic and consular officials of Axis nations and Axis businessmen grew to include enemy aliens who were teachers, small businessmen, tailors and barbers, mostly people of Japanese ancestry. Over two-thirds, or 2,300, of the Latin American internees deported to the United States were Japanese nationals and their families; over eighty percent came from Peru.1 About half the Japanese internees were family members, including Nisei, who asked to join their husbands and fathers in camps pending deportation to Japan; family members were classified as "voluntary internees."2

Underlying these deportations was fear of Japanese attack in Latin America, particularly at the Panama Canal, which produced suspicion of Latin American Japanese. But a curious wartime triangle trade in Japanese aliens for internment developed, too. Some Latin American countries, particularly Peru, deported Japanese out of cultural prejudice and antagonism based on economic competition; the United States, in turn, sought Latin American Japanese

internees to exchange with Japan for American citizens trapped in territories Japan controlled. The same dynamic often affected Germans and Italians.

Deportees from Peru for internment in the United States dominated the Latin American deportation program and thus this discussion centers on them. The history of the Japanese in Peru offers suggestive parallels to West Coast history.

In the late 19th and early 20th centuries, expanding agriculture in Latin America attracted surplus skilled farm labor from Japan; by 1923 almost 20,000 Japanese had settled in Peru alone.3 During the 1930's, economic depression in Japan and restricted immigration to the United States4 drew more Japanese to Latin America, where 23,000 entered Brazil in a single year.5 Worsening economic conditions in Latin America, however, brought discriminatory legislation and business practices aimed at these immigrants.

Japanese in Peru inherited years of prejudice earlier directed against Chinese immigrants. Many Japanese in Latin America had migrated to urban areas where they built close-knit communities, opened small businesses and gained economic independence. The Peruvian Japanese formed ethnic business associations and social organizations, and, although some Japanese married Peruvians and the typical family joined the Roman Catholic church,6 many kept a love of Japan, nursed feelings of cultural superiority and sent their children to Japan for formal education. In Peru, most Japanese immigrants steadfastly refused Peruvian citizenship. This history fueled Peruvian resentment against them; economic competition, including fears of Japanese farmers and merchants monopolizing fertile land and some service industries, aggravated prejudice. Peru severely restricted Japanese immigration in 1936

and followed up by restricting the right to citizenship of some Peruvian Japanese, including Kibei. In 1940, when about 26,000 Japanese lived in Peru, including 9,000 Nisei,7 riots broke out. Japanese businesses were destroyed and homes ransacked, and restrictive laws muzzled the Japanese press.

By 1940, the United States had become directly involved with security in Latin America. After the European war erupted in 1939, the government posted FBI agents in United States embassies in Latin America to compile information on Axis nationals and sympathizers.8 Following Pearl Harbor, the United States immediately moved to secure the Western Hemisphere against dangerous enemy aliens. For the first time, Japanese-owned businesses in Latin America appeared on the United States' Proclaimed List of Blocked Nationals and were thus blacklisted through economic warfare. After a meeting of Western Hemisphere nations early in 1942, the Emergency Advisory Committee for Political Defense was created, composed of representatives from the United States, Argentina, Brazil, Chile, Mexico, Uruguay and Venezuela. The Committee forwarded to Latin American countries recommendations to control subversive activities and to secure the hemisphere, emphasizing internment of Axis nationals.9 Several Latin American countries, severing ties with the Axis, imposed restrictions against Axis nationals.

Acting on Emergency Advisory Committee recommendations or in response to United States security efforts, sixteen Latin American countries interned at least 8,500 Axis nationals during World War II.10 Economic and political pressure from the Proclaimed Lists and the Emergency Advisory Committee, coupled with Latin American nations'

inability to establish costly security programs, encouraged the United States to accept Latin American enemy aliens for internment. Twelve Latin American countries-Bolivia, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama and Peru-deported some or all of their enemy alien internees to the United States.11 (Brazil and Venezuela did not.) Once in the United States, the State Department had custody and held internees in camps operated by the Justice Department's Immigration and Naturalization Service (INS).

The model of the Latin American deportation and internment program was developed in Panama. Before the war, the United States had agreed orally and informally with Panamanian officials to intern Japanese nationals during wartime. After the Pearl Harbor attack, Panama declared war on the Axis and froze Japanese assets. Japanese aliens were arrested by Panamanian and American agents for security reasons because they were near the Canal Zone. The War Department instructed the Commanding General of the Caribbean Defense Command to construct an internment camp in Panama for enemy aliens.12 Panama later agreed to transfer internees to the United States to be traded for Western Hemisphere nationals held in Japan.13

In Peru, the State Department aimed to eliminate potential military threats and to integrate Peru's economy and government into the war effort. After war broke out, Peru notified the War Department that the United States could place military installations there; a small military force eventually encamped near the oil fields of northern Peru, and the United States promised $29 million in armaments through Lend-Lease

agreements, the largest pledge to a Latin American state.14. Peru moved quickly against its Japanese residents, whose newspapers, organizations and schools were closed after December 7. Japanese assets were frozen, and the Proclaimed Lists brought hardship to Japanese businesses; some Peruvian Japanese were asked to leave, many deportations occurred, almost 500 Japanese registered requests at the Spanish Embassy, which represented Japan in Peru.15 This group was among the first to be deported. The initial targets of the American-Peruvian deportation program were alien diplomatic and consular officials and some business representatives of Japan. Peru wished to deport all Japanese and other nationals as well, but the United States recognized its limited need of Latin American Japanese for exchange with Japan; the problems of limited shipping facilities; and the administrative burden of a full-scale enemy alien deportation program. The United States limited the program to deporting officials and "dangerous" enemy aliens.

John K. Emmerson, Third Secretary of the American El Peru, who had been a language student in Japan and could speak and read Japanese fluently, was assigned to help the Peruvians identify "dangerous" aliens and compile deportation lists.16 But deportations were in fact planned with little coordination between the United States and Peru, and Peru chose some deportees over others for no reason, although bribery may have been involved. Moreover, the inaccurate portrayal by Peruvian officials of Peruvian Japanese as deceptive and dangerous encouraged the United States to deport and intern not only Japanese nationals, but some Peruvian citizens of Japanese descent. 17 During early 1942, approximately 1,000 Japanese, 300 Germans and 30

Italians were deported from Peru to the United States with about 850 German, Japanese and Italian aliens picked in Ecuador, Colombia, and Bolivial8 and an additional 184 men Panama and Costa Rica. 19 Normal legal proceedings were ignored and none of the Peruvians were issued warrants, granted hearings, or indicted after arrest. On entering the United States, officials of Axis nations were placed in State Department custody and private citizens were sent to INS internment camps in Texas. In most cases passports had been confiscated before landing, and the State Department ordered American consuls in Peru and elsewhere to issue no visas prior to departure.20 Despite their involuntary arrival, deportees were treated as having illegally entered this country .21 Thus the deportees became illegal aliens in U.S. custody who were subject to deportation proceedings, i. e. , repatriation.

Most of the first group of deportees from Peru were men, primarily diplomatic and consular officials, representatives of Japanese interests, and private citizens targeted as community leaders and thus "believed to be dangerous. " Categorical classifications of some as "believed to be dangerous" enabled the deportation of many private citizens because the United States was unwilling to investigate the need to deport each individual. As John Emmerson later stated: "Lacking incriminating evidence, we established the criteria of leadership and influence in the community to determine those Japanese to be expelled. "22

By June 1942, many Latin American countries had severed diplomatic relations with the Axis nations. Lend-Lease and trade consignments between the United States and Latin America had strengthened hemispheric unity. But the United States was not

confident that Latin America could control subversive activity and thus increased its interest in the deportation and internment program. By this time traffic in the exchange of Japanese and other Axis nationals for American citizens was growing. By early 1942, aided by Swiss and Spanish intermediaries, the United States and Japan had begun negotiating for the exchange of nationals, both officials and private citizens. By July , the United States had deported approximately 1,100 Latin American Japanese and 500 Germans to their home countries.23 Enemy alien citizens who threatened nothing were uprooted from their homes to be used in the exchange. By August 1942, the State Department estimated that, in addition to the Americans caught as Japan advanced across the southwest Pacific, at least 3,300 Americans were trapped in China and available for exchange with Japan.24 These considerable numbers increased American interest in receiving Japanese deportees from Latin America. But slow communications, problems in obtaining assurances that repatriates could pass safely through the war zone, shipping shortages, and Justice Department refusal to repatriate an individual against his will, delayed further repatriations for over a year. As a result, "dangerous" enemy aliens were deported to the U.S. at a comfortable pace for both Latin America and the United States, including INS administrators seeking to prevent overcrowding in the camps.

In January 1943, after 200 more Japanese aliens had been deported from Peru, the Justice Department refused a State Department request for the deportation of another 1,000 Latin American Japanese.25 Unsatisfied with the screening procedures of the American embassy in Peru as well as Peruvian practices in identifying dangerous individuals, the

Justice Department sent Raymond Ickes of its Alien Enemy Control Unit to Peru to oversee the selection. Ickes, partially successful in overcoming low-level Peruvian officials' obstructionism and indifference, entertained a novel idea shared by other American officials in Peru and President Prado--to establish internment camps in Peru financed by the United States. The Administration had already requested appropriations to establish an internment camp in Cuba. Moreover, the State Department was reluctant to encourage Peru to breach international law by sending all its Peruvian Japanese from a nonbelligerent state directly to a belligerent one.26 But the American embassy in Peru vetoed the Peruvian camp idea, distrusting Peruvian officials' ability to intern dangerous individuals-a view supported by
Peru's record in the deportation. As Emmerson had reported earlier, "since local police and other officials are susceptible to Japanese bribes, their alertness cannot be depended upon. "27 Indeed, Arthur Shinei Yakabi, a bakery worker deported from Peru, testified: "I was asleep in February 1943 when some Peruvian police came and arrested my employer. My employer pulled a fast one by bribing the police, and offered me as a substitute."28 In addition, the embassy's view of the danger posed by Peruvian Japanese was changing by the end of summer 1943; Emmerson, now Second Secretary, was confident that the Japanese community no longer constituted a threat to security .29 The Latin American deportation program continued nevertheless.

In May 1943, the Emergency Advisory Committee adopted a resolution that American republics intern and expel dangerous Axis nationals.30 Near the end of 1943, the Committee reviewed the Latin American security situation and concluded that

direct United States involvement in securing the hemisphere was crucial. Except for Brazil, no Latin American country had initiated security measures compatible with United States standards. The Committee wanted agreements for deportation programs from Chile, Uruguay, Paraguay, Venezuela and Colombia.

The repatriation and exchange program proceeded slowly. In September 1943, over 1,300 Japanese left New York for Japan, over half from Peru, Panama, Costa Rica, Mexico, Nicaragua, Ecuador, Cuba, El Salvador and Guatemala; almost 40 percent of the entire contingent was from Peru.31

In the spring of 1944, the State Department realized that no more Axis nationals would be repatriated until the war was over. Nevertheless, from January to October 1944, over 700 Japanese men, women, children and 70 German aliens were deported from Peru to the United States, along with over 130 enemy aliens from Bolivia, Costa Rica and Ecuador.32 Peru pushed for additional Japanese deportations, but the United States could not commit the shipping and did not want to augment the hundreds of Japanese internees awaiting repatriation. The State Department also decided not to repatriate Axis nationals against their will, realizing that many internees might not want to return to a devastated country. Thus deportation proceedings lagged and the INS internment camps became overcrowded.

Internees at INS camps in Crystal City, Kennedy and Seagoville, Texas, and Missoula, Montana, had two main concerns: having their families join them in the United States and repatriation to Japan. Living conditions at the camps were not unlike those in the war relocation centers. Confinement's bad effects were

evident: lack of privacy, family breakdown, listlessness and uncertainty about the future. To safeguard the internees from unhealthy conditions, the camps were inspected routinely by Spain, the International Red Cross, the War Prisoners Aid of the YMCA and the YWCA, the American Friends Service Committee, and the National Catholic Welfare Conference. At the end of the war, approximately 1,400 Latin American Japanese, mostly from Peru, were interned in the United States, awaiting a decision on their destiny. Some wished to return to Latin America, others to Japan. To most it was a choice of the lesser of two evils: they had lost everything in Latin America, but Japan, which they had left to pursue greater economic opportunity, was devastated by the war. A number wanted to remain in the United States and begin anew.

As the end of the war approached in Summer 1945, the United States and other Western Hemisphere nations began to consider the postwar fate of interned Axis nationals. President Truman issued Proclamation 2655 authorizing the United States to deport enemy aliens deemed "to be dangerous to the public peace and safety of the United States."33 The Latin American Conference on Problems of War and Peace passed a resolution recommending that persons deported for security reasons should be prevented from "further residing in the hemisphere, if such residence would be prejudicial to the future security or welfare of the Americas. "34

The State and Justice Departments disagreed about security measures to take against interned enemy aliens. The Justice Department wanted to remove internees from its jurisdiction and divorce itself from the deportation and internment program; the State Department wanted to conclude the program by

removing all dangerous Axis influences from the hemisphere.35 As part of its long-term security strategy, in September 1945 the State Department secured a proclamation from President Truman directing the Secretary of State to remove any enemy aliens in the United States from the Western Hemisphere, including those from Latin America, who were illegal aliens and dangerous to hemispheric security.

In December 1945, approximately 800 Peruvian Japanese were voluntarily deported to Japan,36 but in general the internment ended very slowly and tortuously. The United States sought to return internees who were not classified as dangerous and who refused deportation to Axis countries, to their points of origin in Latin America.37 But the common hemispheric interests that bred the deportation had dissolved, and the government now had to negotiate about returning internees to Latin America using weak, hastily-written wartime agreements, for the United States had not exacted initial guarantees defining the deportees' postwar fate. For the most part, the Central American and Caribbean countries that had deported enemy aliens to the United States had placed few restrictions on their disposition. Mexico, Colombia and Ecuador had required specific guarantees before releasing enemy aliens to the United States. Peru, Ecuador and El Salvador wanted jurisdiction over internees in order to obtain the return of some German deportees, for many Germans in Latin America, unlike the Japanese, had acquired economic and political influence as well as greater social acceptance. Peru had sought no firm agreement from the United States concerning final destination and wanted to restrict the return of Japanese (but not German) internees. The

United States wanted a consistent policy for the Latin American internees and gave Peru the choice of accepting all non-dangerous internees or leaving deportation control to the United States. So negotiations dragged on for the return to Peru of Peruvian Japanese.

Meanwhile, the internees used litigation to block deportation to Axis states. Some German internees filed habeas corpus petitions challenging their detention by the United States, claiming that they were not alien enemies as defined by the Alien Enemy Act of 1798, because they were not natives or citizens of an enemy country. In January 1946, this effort failed when a federal district court ruled that the Latin American internees were "alien enemies" who could legally be detained.38 After this decision, 513 Japanese (over ninety percent from Peru), 897 Germans and 37 Italians from Latin America in United States internment camps were granted hearings pending deportation to Axis countries.39 The hearings were a formality leading inevitably to deportation to Axis countries, although most of the remaining Latin American Japanese wished to return to Peru. Voluntary repatriation continued into 1946, with at least 130 Peruvian Japanese returning to Japan by June.40

The final destiny of the Latin American Japanese was placed in the hands of the Justice Department after the State Department concluded that insufficient evidence existed to call the remaining Japanese internees dangerous to the Western Hemisphere.41 The State Department, although willing to proceed with deportations to Japan, hoped the Justice Department would stop deportation proceedings against Peruvian Japanese with families in Peru.42 The process moved very slowly for those who wanted to remain in the

United States or return to Peru. Two Peruvian Japanese, Eigo and Elsa Kudō, remembered their anxious waiting period:

> There were several hearings. to persuade these poor internees to leave for Japan. We were one of those who asked, "Why are we illegal aliens when we were brought under armed MPs and processed by the immigration officers upon arrival in New Orleans?" ...Again and again they repeated, "you are illegal aliens because you have no passports nor visa. .."43

In August 1946, Wayne Collins, an attorney who had often helped Issei and Nisei over the years, arranged for some Peruvian Japanese to be transferred from INS internment camps to a fresh produce processing plant in Seabrook, New Jersey, where Japanese Americans had worked during the exclusion from the West Coast. The internees welcomed Seabrook as an opportunity to escape camp life, restore traditional family life, and earn relatively decent wages while awaiting word of their ultimate fate; at the same time, it must be recognized that conditions at Seabrook were far less attractive than those of ordinary liberated life. Other internees were paroled from the INS camps under sponsorship of American citizens.

To some extent, returning internees to Peru was further complicated during 1946 by a nationalistic pro-Japan underground movement, the Acacia Doshi-Kai, which sprang up in Peru and South America. Both Peruvian and American officials overestimated the movement's influence, but the United States accepted Peru's reluctance to bring Japanese deportees back into a country inflamed by anti-Japanese sentiment. Peru announced that it would allow only Peruvian citizens of

Japanese descent and Japanese related to Peruvian citizens to return,44 and from May to October 1946, only about 100 Japanese internees went back to Peru.45 At the same time, almost 600 German nationals were returned to Latin America in the year 1945-46.46

At the beginning of 1947, 300 Peruvian Japanese remained in the United States, the majority at Seabrook. Those with family ties in Peru entertained hopes of returning home. Talks between the United States and Peru were stalemated during 1947; negotiations were renewed with the Peruvian government which had come to power in a coup in the winter of 1948-49, but it refused to accept any non-citizens.

In the spring of 1949, exasperated State Department officials concluded that the only solution to the Peruvian Japanese internee problem was to give internees the status of "permanent legally admitted immigrants" who could remain in the United States.47 Finally, in July 1952, the remaining Japanese Peruvian internees, having resided in the United States for seven years or more, petitioned the Board of Immigration Appeals to reopen hearings to suspend deportation orders, and Congress approved the deportation suspensions in 1953. The wartime deportation and internment program was finally at an end. But, for some, the emotional trauma of the program was endless. Peruvian deportee Ginzo Murono stated: "Some of the people from Peru who were interned with me were separated from their families for many years. In a few cases, the broken families were never reunited."48

Historical documents concerning the ethnic Japanese in Latin America are, of course, housed in distant archives, and the Commission has not

researched that body of material. Although the need for this extensive, disruptive program has not been definitively reviewed hy the Commission, John Emmerson, a well-informed American diplomat in Peru during the program, wrote more than thirty years later: "During my period of service in the embassy, we found no reliable evidence of planned or contemplated acts of sabotage, subversion, or espionage."49 Whatever justification is offered for this treatment of enemy aliens, many Latin American Japanese never saw their homes again after remaining for many years in a kind of legal no-man's-land. Their history is one of the strange, unhappy, largely forgotten stories of World War II.

Appendix

Latin Americans

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U.S. COURTS BECOME ARBITERS OF GLOBAL RIGHTS AND WRONGS

By WILLIAM GLABERSON

Last year, five Chinese natives sued the former Chinese prime minister, Li Peng, in an American court for his role in the Tiananmen Square crackdown that killed hundreds of civilians in Beijing.

While visiting the United Nations in September, President Robert Mugabe of Zimbabwe was served with a civil suit saying he ordered killings, torture and terrorism in his country and seeking $400 million in damages.

In Brooklyn, a federal judge is considering legal claims of Canadians and Israelis in addition to Americans against a French railroad that transported people to Nazi death camps.

Those and many other kinds of cases reflect the growing use of the American legal system to judge rights and wrongs all over the globe.

The trend, which began in the mid-1980's and has been accelerating in recent years, is strongest in human rights cases. But it extends to other areas of the law, like business claims under American antitrust, securities and racketeering laws and criminal prosecutions of foreign terrorists captured abroad.

"The cold war paradigm was the United States as global policeman," said Gregory J. Wallance, a lawyer at the international law firm, Kaye Scholer in New York, who has written about the trend. "The post-cold-

war paradigm is the United States as global attorney."

Some of the cases are essentially symbolic, ending in huge civil verdicts that may never be collected. But others have led to criminal charges here, large civil settlements, or financial recoveries drawn from foreign property held in the United States.

There is some resentment over expansion of American legal power, but because many of the cases relate to human rights' claims, critics have had difficulty drawing attention to their concerns.

American lawyers have cast a wide net. Among others who have been sued in this country are the former President Slobodan Milosevic of Yugoslavia, the Islamic Republic of Iran, the Prince of Wales and former Prime Minister Margaret Thatcher of Britain.

The expansion of American legal power has been explained in recent years as the natural outgrowth of an interconnected world. But lately, some lawyers and legal scholars have begun to argue that the cases represent a sweeping change that is transforming American courts into institutions with international sway.

"What we are exporting now, just as Britain did in the 19th century, is our conception of law" said Burt Neuborne, a law professor at New York University. Last week, a federal judge awarded Mr. Neuborne $4.4 million in legal fees for his work on a series of cases against German companies and the German government by people forced into slave labor by the Third Reich.

A few American lawyers have made millions on the international lawsuits, while others are handling the cases largely to make human rights or political statements.

Some major legal changes have involved

terrorism abroad. Laws passed by Congress in recent years and international treaties signed since the 1970's have expanded the powers of American courts to try terrorism cases.

A federal jury in Manhattan is hearing evidence in deciding the fate of a Tanzanian in the bombing of the American Embassy in Dar es Salaam, killing 11 people. The jury last week rejected the death penalty for a Saudi in the bombing of the American Embassy in Nairobi, Kenya, killing 213 people.

The United States used treaty provisions that require countries to "prosecute or extradite" terrorism suspects to bring some of the defendants in the embassy bombings to this country.

The fact that American prosecutors tried the case is one sign of the changing views on international prosecution, several legal experts said. Historically, criminal prosecutions were mounted most often where the crimes occurred. In 1986, Italian courts convicted four Palestinian gunmen who had hijacked the Italian cruise ship Achille Lauro off the Egyptian coast and killed an American, Leon Klinghoffer.

One reason for the change is "a much more expansive notion of U.S. prerogatives to protect its interests," said Ruth G. Wedgwood, an international law specialist at Yale.

One example of the new legal thinking was legislation passed by Congress in 1996, which for the first time permitted lawsuits in American courts against countries that the United States listed as sponsoring terrorism. Libya, Cuba and Iran are on the list. Before that, such suits were generally barred by American rules that protect governments from lawsuits in United States courts.

In February, the Treasury Department

authorized the release of $96.7 million from Cuban assets frozen in the United States. The money went to the families of three Miami-based pilots who were shot down by Cuban fighter jets in 1996. The families of the pilots, who were members of the Cuban exile group Brothers to the Rescue, had sued the Cuban government in federal court in Miami under the 1996 law.

Americans have always been able to sue foreign individuals who were in this country. But before a landmark ruling of a federal appeals court in New York in 1980, American courts were reluctant to get involved in disputes between foreigners involving events in other countries.

In the 1980 decision, the United States Court of Appeals for the Second Circuit said a seldom-used law dating of 1789 authorized foreigners to sue other foreigners in this country when they claimed violations of international legal norms, like rules against murder or torture.

The 1980 case involved a lawsuit by a Paraguayan doctor against a former police official who, the court found, has tortured and killed the 17- year-old son of the doctor, who was a Paraguayan opposition leader.

Since then there have been dozens of other suits under the 1789 law, the Alien Tort Claims Act. And in the last few years cases have sought increasingly larger damage awards, said Jennifer M. Green, a lawyer at the Center for Constitutional Rights in New York, which is handling many of the cases.

Last year, a jury in federal court in Manhattan ordered Radovan Karadzic, the former Bosnian Serb leader, to pay $4.5 billion in damages to people who were raped, tortured and killed in the Balkan conflict.

The scope of American judicial expansion is not limited to terrorism and human rights cases. American antitrust prosecutors have successfully argued that groupings of international companies are subject to American rules prohibiting collusive agreements to set prices even if only one member of the cartel sells products in this country.

Under such rules, executives from Belgium, Britain, Italy, Japan, the Netherlands and other countries have been convicted in American courts. The Clinton administration began a push to prosecute international price fixing, and the Bush administration is expected to continue that drive.

But globalism means there are two sides to such expansive notions. European regulators have started to apply their own laws to American businesses. Skepticism by European regulators has stalled several recent mergers by American companies, including General Electric's planned $45 billion acquisition of Honeywell International.

Some courts refuse to get involved in foreign matters. American courts declined, for example, to hear lawsuits against the Prince of Wales and former Prime Minister Thatcher, which claimed they had violated human rights in Northern Ireland and Libya.

But American courts are increasingly willing to stretch their authority. Among the cases that opened the door was a Supreme Court ruling in 1992 that said a Mexican charged with killing an American drug enforcement agent could be tried in this country even though agents had kidnapped him from Mexico.

Similarly, in 1991, a federal appeals court in Washington approved the trial of a man who federal prosecutors said was a Lebanese militia official, Fawaz Yunis, who was charged with hijacking a Jordanian

plane in Beirut and was arrested while on a yacht in the Mediterranean.

These cases are a far cry, some lawyers say, from a New York federal court's refusal in 1987 to consider the multibillion-dollar lawsuits against the Union Carbide Corporation over the Bhopal chemical disaster in India.

In addition to court rulings, American legal values are also exported informally, Mr. Wallance of Kaye Scholer argued in an article last year. As an example he cited boycotts of clothing brands manufactured in countries that do not comply with American workplace rules.

So far, criticism of expanding ambitions of the American legal system has been muted. But some foreign governments have said they are offended by suits in this country, and some American legal experts warn that the United States is opening what could be a dangerous legal competition with other countries.

Other countries are already trying to expand the influence of their legal rules or to fight off the influence of America's legal system. Some European countries are resisting a proposed international agreement in The Hague that would make it easier to enforce judgments of American courts abroad.

If American diplomats and executives become entangled in lawsuits in other countries, the United States might start to view its legal expansionism in a different light, said Curtis A. Bradley, a law professor at the University of Virginia.

In early June, a Chilean judge said he would try to get Henry A. Kissinger, the former United States secretary of state, to testify about the disappearance of an American in Chile when the dictator Augusto Pinochet seized power in the 1970's.

Jack L. Goldsmith, a law professor at the University of Chicago, said Americans have not considered the consequences of applying this country's law all over the world.

"The United States loves to export our values," Mr. Goldsmith said, "but not if it gives other countries the power to review what we do."

LOS ANGELES TIMES

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SIX SUE U.S., SEEK REDRESS FOR WWII INTERNMENT

By JESSICA GARRISON

Jane Yano was born in an internment camp in Crystal City, Texas, in early 1947 and, along with her family, remained behind barbed wire until August 1947, two full years after the war with Japan ended.

So when the U.S. government offered a formal apology and $20,000 each in compensation to the more than 80,000 Japanese Americans who were rounded up from their homes and shipped to camps across the country during World War II, Yano assumed that she too would get a letter and a check.

But officials told her that because she was born after August 1946, by which time most of the camps had closed, she was ineligible for reparations.

Yano is one of six former internees who filed a lawsuit against the government Thursday seeking redress.

The six were found ineligible by government

officials for different reasons, but all say the government is hiding behind legal technicalities to deny them what they are owed.

The lawsuit seeks $10 million per person, but attorney Paul Mills his clients would settle for the $20,000 given to other internees.

Thom Mrozek, spokesman for the U.S. attorney's office in Los Angeles, said the office had not had time to review the lawsuit and so could not comment on it.

"It's hard to believe our government would be so callous," said Rep. Xavier Becerra (D-Los Angeles). He said he plans to introduce legislation in Congress that would cut the red tape for Yano and those like her. four of the six are people of Japanese descent from Latin America who were taken into custody by U.S. soldiers and forcibly shipped to a camp in the United States and then deported to Japan after the war.

The government told them that because they entered the country under U.S. soldiers' guns, they are not legal U.S. residents and there fore not eligible under the law.

The sixth plaintiff is Kay Kato, 91, who came to the United States from Japan in 1937 on a merchant visa, and has been in this country since then. He was put in an internment camp from 1941 to 1945. Because of a law prohibiting Japanese from naturalizing during the 1930s, he did not become a legal permanent resident until 1958. Because he had not been a legal resident during World War II, he was considered ineligible for redress by the government.

The Civil Liberties Act, which provided for redress for those interned during World War II, had "very specific criteria about who was eligible and who was not," said Chris Komai, spokesman for the Japanese American National Museum in Los Angeles.

Historians are still trying to piece together why some Japanese Americans, such as Yano, were detained beyond the end of the war at Crystal City, Komai said. Other internment camps were closed in 1944 and 1945. But Crystal City remained open, and in some cases, Komai said, people were sent from other camps to Crystal City.

No. 01-7

Supreme Court, U.S.
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In The

Supreme Court of the United States

KAY SADAO KATO, *et al.*,

Petitioners,

v.

UNITED STATES, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* OF INTERNATIONAL LAW ERIC K. YAMAMOTO, UNIVERSITY OF HAWAII SCHOOL OF LAW, DALE MINAMI, MINAMI, LEW & TAMAKI, AND NATSU SAITO, GEORGIA STATE UNIVERSITY COLLEGE OF LAW IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

Amici Eric K. Yamamoto and Natsu Taylor Saito are professors of law expert in the fields of international law, international human rights, domestic civil rights, and the application of international law by the courts of the United States, as more particularly set forth below. Amicus Dale Minami is an expert in civil rights law and has litigated numerous cases concerning the World War II internment of Japanese Americans. The views of jurists and scholars on points of international law are taken into account when such questions arise in U.S. courts. See, *e.g.*, *The Paquete Habana*, 175 U.S. 677, 700 (1900); *United States v. Smith*, 18 U.S. 153, 160-161 (1820).

Eric K. Yamamoto is a Professor of Law at the University of Hawai'i School of Law, where he teaches in the areas of civil and human rights law, racial justice, civil procedure and complex litigation. Professor Yamamoto was co-counsel to Fred Korematsu in the *coram nobis* proceeding re-opening the World War II Japanese American internment case, *Korematsu v. United States*, 323 U.S. 214 (1944). See *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984). He was also procedural consultant to the legal team which brought several human rights cases against Ferdinand Marcos for the torture and murder of political dissidents in the Philippines. See, *e.g.*, *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992). Professor Yamamoto has written numerous law review articles including *Collective Memory, History and Social Justice* (with Sharon Hom), 47 U.C.L.A. L. Rev. 1747 (2000); *Racial*

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3 of this Court. Pursuant to Rule 37.6, amici state that they authored this brief in its entirety. A monetary contribution to cover the cost of printing and postage was made by William C. Wardlaw, III.

Reparations: Japanese American Redress and African American Claims, 40 B.C. L. REV. 477, 19 B.C. THIRD WORLD L.J. 477 (1998); and *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-civil Rights America*, 95 MICH. L. REV. 821 (1997).

Natsu Taylor Saito is a Professor of Law at the Georgia State University College of Law, where she teaches Public International Law, International Human Rights Law, Immigration Law, and Race and the Law. She has written a law review article on international law and the internment of Japanese Latin Americans, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians – A Case Study*, 40 BOSTON COLL. L. REV. 275, 19 B.C. THIRD WORLD L.J. 275 (1998) (joint issue), and filed an amicus brief in the Ninth Circuit Court of Appeals in a related case, *Henry Koshio Shima v. United States* (unpublished opinion, May 2, 2001). Her other publications include *From Slavery and Seminoles to AIDS in South Africa: An Essay on Race and Property in International Law*, 45 VILLANOVA L. REV. 1135 (2000); *Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States*, 1 YALE HUM. RTS. DEV. L.J. 4 (1998) (web-based journal: http://diana.law.yale.edu/yhrdlj/); and *Alien and Non-Alien Alike: Citizenship, "Foreignness" and Racial Hierarchy in American Law*, 76 OREGON L. REV. 261 (1997).

Amicus Dale Minami of the law firm of Minami, Lew & Tamaki, has litigated cases involving civil rights, human rights and constitutional law for decades. He has brought numerous cases vindicating the civil rights of Asian Americans, including cases involving police practices, employment discrimination, and access to education, and was the co-founder of the Asian Law Caucus and its managing attorney for several years. Dale Minami was lead counsel for Presidential Medal of Freedom

award winner Fred Korematsu, in the *coram nobis* case which overturned Korematsu's forty-year-old conviction for refusing to obey military orders during the World War II internment of Japanese Americans.

Thus having an interest, through scholarship and practice, in the development of jurisprudence on various questions related to the pending matter, amici file this brief with the United States Supreme Court concerning the construction of the Civil Liberties Act of 1988 (hereinafter "CLA"), 50 U.S.C. §§ 1989 *et seq.*, as amended, in light of the international legal obligations of the United States, in the context of the present appeal of the decision of the circuit court.

STATEMENT OF THE CASE

Amici incorporate by reference the statement of the case submitted by the Petitioners.

SUMMARY OF ARGUMENT

The United States government has made promotion of the global rule of law, particularly human rights law, a centerpiece of its foreign policy, and U.S. federal courts are rapidly becoming the forum of choice for international litigation. The United States has also been very active in promoting redress for World War II victims of human rights abuses. At the same time, the United States has been criticized for what is perceived as a failure to hold itself to the standards it promotes internationally, and the decisions of federal courts in international human rights cases are closely scrutinized by the international judicial community.

In this case, which involves the United States' failure to compensate for significant violations of international law in its World War II internment of Japanese Americans and Japanese Latin Americans, these dynamics come

together in sharp focus. While it does not involve large numbers of people or large sums of money, it is being closely watched as an indicator of whether United States courts take international law seriously.

It is undisputed that the United States government engaged in numerous violations of international law when it caused the imprisonment of Petitioners Kato and Yano in concentration camps, and caused the Ogura family Petitioners, along with over two thousand similarly situated Japanese Latin Americans, to be kidnapped and deported from their homelands, transported to the United States against their will, some forced to perform unpaid labor en route, imprisoned for the duration of the war in the United States, and subsequently deported against their will to Japan. These actions violated well-established proscriptions against the indefinite internment of civilians, the kidnapping and deportation of civilian non-combatants from non-belligerent to belligerent countries on the basis of their racial or ethnic identification without charge, hearing or determination that they posed a threat to any nation's security, and the holding of hostages.

The right to redress is a well-established principle of international law, and the United States' on-going refusal to compensate Petitioners for these violations constitutes a continuing violation of international law. Further, the refusal to provide redress under the Civil Liberties Act of 1988 on the basis of national origin constitutes an additional on-going violation of international law.

International law has been recognized as part of the supreme law of the land since the ratification of the Constitution. Long-standing rules of statutory construction mandate that, where possible, the courts must interpret statutes in accordance with the United States' obligations under international law. Because the lower

courts' summary dismissal of Petitioners' claims signals a disregard for both the Petitioners' civil and human rights, and for international law more generally, amici urge this Court to grant Petitioners' request for a writ of certiorari and to consider the international law claims raised in this case. Failure to do so not only harms Petitioners and similarly situated Japanese Americans and Japanese Latin Americans, but also harms the interests of the United States by sending the message that the United States government believes it can violate international law with impunity while sanctioning other nations for their failure to comply with the global rule of law.[2]

ARGUMENT

A. The United States' Kidnapping, Indefinite Imprisonment, Holding Hostage, and Deportation of Petitioners During World War II Violated International Law

1. Kidnapping, Transporting and Deporting Petitioners Violated International Law

The United States violated well-established principles of international law by collaborating with the Peruvian government (as well as other Latin American governments) to kidnap and deport Petitioners and other civilian non-combatants, many of whom were citizens of those Latin American countries, from a non-belligerent country to a belligerent country, on the basis of their racial or ethnic identification, without charge, hearing or

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[2] For a more detailed discussion of the arguments made herein, see Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians – A Case Study*, 40 BOSTON COLL. L. REV. 275, 19 B.C. THIRD WORLD L.J. 275 (1998) (joint issue).

determination that they posed a serious threat to U.S., Peruvian or "hemispheric" security.

Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (hereinafter "Geneva Convention") states:

> Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the occupying power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Aug. 12, 1949, 75 U.N.T.S. 287 (1949). Article 146 of the Geneva Convention provides that the parties will "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches . . . defined in the following Article." Article 147 says, "Grave breaches . . . shall be those involving any of the following acts . . . unlawful deportation or transfer or unlawful confinement of a protected person. . . . " *Id.*

While the drafting of this treaty was not completed until a few years after World War II, "[t]hese articles of the Geneva Convention of 1949 merely codify the prohibition of deportations of civilians from occupied territories which in fact already existed in the laws and customs of war," and a proposal to prohibit deportations had been included in the Tokyo Draft of the Geneva Convention adopted at the International Red Cross Conference of 1934. Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L.J. 208, 210 (1975).

Some of this customary law had been codified in the 1907 Hague Regulations. See 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the 1907 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War

on Land, also known as the Hague Regulations. According to the Commentary to the 1949 Geneva Convention, the 1907 Hague Regulations probably did not explicitly prohibit deportations "because the practice of deporting persons was regarded . . . as having fallen into abeyance." Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 VAND. J. TRANSNAT'L L. 469, 480 (1993).

Even further back than the Hague Conventions, deportations of civilians were condemned by the United States in 1863 in Lieber's Code, also known as U.S. Army General Order 100. The Code mandated, "Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford. . . . " RICHARD HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 45, 49 (1983).

Throughout the Second World War, the Allies made it clear that they considered the mass expulsion of civilians to be criminal. Deportation of civilians during World War II was among the war crimes for which German and Japanese defendants were convicted by the Nuremberg and Tokyo Tribunals. Article 6 of the Charter of London, which established the basis for the International Military Tribunal at Nuremberg, gave the Tribunal jurisdiction over three categories of crimes: (1) crimes against peace; (2) war crimes, "namely, violations of the laws or customs of war . . . [which] shall include, but not be limited to . . . ill-treatment or deportation to slave labor or for any other purpose of civilian population . . . " ; and (3) crimes against humanity, which included " . . . deportation, and other inhumane acts committed against any civilian population . . . ; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether

or not in violation of the domestic law of the country where perpetrated." Agreement and Charter of the International Military Tribunal, Art. 6 (Aug. 8, 1945), 82 U.N.T.S. 279 (1945).

According to international military scholar Georg Schwarzenberger,

> In the Charter of the Nuremberg Tribunal, deportation of civilians from occupied territories to slave labour or for any other purpose is enumerated, under the heading of war crimes in the strict sense, that is, breaches of the laws or customs or war, and that of crimes against humanity. In the Charter of the Tokyo Tribunal, the subject is specifically mentioned only under the latter heading. . . . there is, however, no doubt about it that breaches of the law of belligerent occupation constitute breaches of the laws and customs of war and, therefore, amount to war crimes in the technical sense. Thus, under both Charters, deportation is a war crime in the technical sense and a crime against humanity. GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 231 (1968) (hereinafter *Schwarzenberger*) at 231.

The Nuremberg and Tokyo Tribunals focused especially on the use of deported civilians as slave labor. *Id.* at 225-226, 230-232. "Forced labour in tropical heat without protection from the sun, complete lack of housing and medical supplies and insistence on work directly related to military operations were some of the features of forced labour castigated in the *Tokyo* Judgment (1948)." *Id.* at 224-226 (noting that compulsory labor was also forbidden by Article 52 of the Hague Regulations of 1899 and 1907). This description fits quite closely the actions of the United States in forcing many of the Japanese Latin Americans to clear jungle, build barracks and perform

other forced labor in the Canal Zone without remuneration.

The United States participated in the prosecution of war criminals at Nuremberg and Tokyo for the crime of deporting civilians during World War II. For the same reasons that it justified these prosecutions, the U.S. government was responsible for knowing that deporting civilians and transporting them from Latin America to the United States was a war crime. Similarly, the forced deportation of Japanese Latin Americans like the Ogura family Petitioners from the United States to Japan at the end of the war constituted a clear violation of international law.

Thus, in its internment of Japanese Americans and Japanese Latin Americans during World War II, the United States violated numerous well-established principles of international law; the very principles which it applied to the Germans and Japanese tried before the Nuremberg and Tokyo Tribunals.

2. The Indefinite Imprisonment of Petitioners Violated International Law

It is well-established that the wholesale internment of civilians based solely on race or national origin, with no individualized inquiry as to security concerns is a violation of international law, even when it occurs during time of war. The internment of civilians by belligerents was discussed as early as the Hague Peace Conferences of 1899 and 1907, but it was decided that an express prohibition was not required as the practice fell below the minimum standard of civilization. SCHWARZENBERGER at 221.

According to Schwarzenberger, it was "the German and Japanese practices, during the Second World War, of wholesale internment of civilians in concentration camps, irrespective of security requirements in individual cases

or for entirely different purposes" that led to the much more precise codification of minimum standards concerning internment that are in the 1949 Geneva Convention. *Id.* at 223. Article 42 of this Convention states that the "internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary," and Article 43 provides that any person so interned "shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board . . . [which, if the internment is maintained] shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision. . . . " Geneva Convention, Arts. 42, 43. The United States did not comply with either of these standards in Petitioners' cases.

The Alien Enemy Act of 1798, 1 Stat. 577, 50 U.S.C. §§ 21 *et seq.* (1998) did provide statutory authorization for the Presidential proclamations which allowed the Attorney General to subject enemy aliens to "summary apprehension" during World War II. See Presidential Proclamation No. 2525, 6 FED. REG. 6321 (1941); Proclamation No. 2526, 6 FED. REG. 6323 (1941); Proclamation No. 2527, 6 FED. REG. 6324 (1941). This did not necessarily violate international law, as it is recognized that enemy aliens who are in the territory of a belligerent can be detained, at least for as long as is necessary to determine if they pose a danger to the security of the country. However, the Act and the related Presidential Proclamations cannot justify the indefinite detention of civilians who were legally in the country (as was Petitioner Kato), born in internment camps (as was Petitioner Yano), or brought into the territory against their will, given no hearings, and known to pose no danger to U.S. or hemispheric security (as were the Ogura family Petitioners).

The United States recognizes that arbitrary or prolonged detention is a violation of international law, even when it is not specifically barred by domestic law. According to the notes to Section 702 of the Restatement on the Foreign Relations Law of the United States, "Arbitrary detention is cited as a violation of international law in all comprehensive international human rights instruments. . . . It is included also in United States legislation and national policy statement citing violations of fundamental human rights. . . . " RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. 1, ch. 1, § 702, n. 6 (1987).

3. Petitioners Were Held as Hostages in Violation of International Law

A hostage is "a person detained for reasons unconnected with his own acts or omissions." SCHWARZENBERGER at 240-241. This definition clearly fits Petitioners and similarly situated Japanese Americans and Japanese Latin Americans, and it was well-established at the time that the holding of hostages was a violation of international law.

In the 1934 Tokyo Draft of the International Red Cross Convention on the protection of civilian alien enemies, reprisals against civilians and the taking of hostages were forbidden. See Robert R. Wilson, *Treatment of Civilian Alien Enemies*, 137 AM. J. INT'L L. 30, 34-35 (1943). The Nuremberg Tribunal referred on several occasions to the taking and killing of hostages, referring, for example, under the heading of "Murder and Ill-Treatment of Civilian Population," to the German practice of "keeping hostages to prevent and to punish any form of civil disorder." SCHWARZENBERGER at 239-240. Although the Tribunal did not rule specifically on the taking (as opposed to killing) of hostages, the Prosecution, led by U.S.

Supreme Court Justice Jackson, argued that, "irrespective of the illegality of the shooting of hostages, under Article 50 of the Hague Regulations, the taking of hostages was illegal." INTERNATIONAL MILITARY TRIBUNAL PROCEEDINGS (English ed., Pt. 5 1946), at 124.

Article 3 of the 1949 Geneva Convention states that in the case of armed conflict within the territory of a Party, the taking of hostages is prohibited at any time and in any place with respect to persons taking no active part in the hostilities. With respect to persons in the territories of parties to the conflict or in occupied territories, Article 34 simply states, "The taking of hostages is prohibited." While the Geneva Convention had not been drafted at the time the United States was holding Japanese Latin Americans as hostages for exchange, it illustrates what was commonly accepted in international law at that time.

Japanese Latin Americans and, to some extent, U.S. citizens and residents of Japanese descent, were held as hostages by the United States government, not because of any act or omission of their own, but because the government thought it could use them, either as "bait" for an exchange or as a "reprisal reserve" to gain better treatment for U.S. citizens held by the Japanese government. See MICHI WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS (1996) at 55-56, 160-166, 182 (hereinafter WEGLYN).

B. The Government's Continuing Refusal To Redress These Wrongs Constitutes An On-Going Violation of International Law

1. The United States Has An Obligation To Provide Effective Redress

"[T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first

duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163 (1803). Just as the concept that there should be a remedy for every wrong is a basic principle of our legal system, the right to redress of a wrong is a fundamental principle of international law. The Universal Declaration of Human Rights, widely acknowledged as reflecting binding norms of customary international law, states: "Everyone has a right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Universal Declaration of Human Rights, G.A. Res. 217, art. 8 (III, 1948).

The importance of this principle has been acknowledged in the recent settlement of various actions brought by victims of the Nazi holocaust. Recognition of this right pre-dates World War II and has been incorporated into both treaties and international legal opinions. As the Permanent Court of International Justice stated in 1928 in the Chorzow Factory case, "reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would . . . have existed if the act had not been committed." Chorzow Factory (Indemnity), 1928 P.C.I.J. (ser. A.) No. 17 at 47.

The United States' failure to compensate the Japanese Latin American victims of these war crimes is itself a violation of international law. The fact that these violations were committed over fifty years ago does not reduce the government's responsibility for two reasons. First, there is no statute of limitations on war crimes, as recognized and affirmed in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. G.A. res. 2391 (XXIII), annex 23 U.N. GAOR Supp. (No. 18) at 40 (1968) (entered into force 1970). Although the U.S. is not a party to this Convention, on this principle its declaration is recognized

as reflecting customary international law, which does bind the United States.

Second, because it has an on-going responsibility to compensate the victims, the United States is engaging in an on-going violation of international law by failing to do so, and in that respect a statute of limitations, should one exist, would not have begun to toll.

2. The Exclusion of the Latin American Petitioners From Redress Under the CLA Constitutes Unlawful Discrimination On The Basis Of Race and National Origin

It is not disputed that the U.S. government took only those German and Italian Americans and Latin Americans who were individually deemed to be dangerous, while interning all persons of Japanese descent on the west coast of the United States, and while kidnapping and deporting Japanese Latin Americans solely on the basis of their ancestry. WEGLYN at 63, quoting letter from Secretary of State Hull to President Roosevelt (Aug. 27, 1942). At the time, U.S. officials were cognizant of the racism behind the Peruvian government's efforts to rid the country of its Japanese population. They supported and directed the activities of the Peruvian authorities in this matter. See JOHN EMMERSON, THE JAPANESE THREAD: A LIFE IN THE U.S. FOREIGN SERVICE 125-149 (1978); see generally, C. HARVEY GARDINER, PAWNS IN A TRIANGLE OF HATE: THE PERUVIAN JAPANESE AND THE UNITED STATES (1981).

At the time of the internment, there were no international agreements prohibiting racial discrimination. However, due in large measure to the horrors of World War II, such prohibitions have become well-established in international law. The Universal Declaration of Human Rights, adopted in 1948, states in Article 2 that everyone is entitled to all the rights and freedoms set forth in this

Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966) (entered into force Mar. 23, 1976), to which the United States is a party, states that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race . . . national or social origin, property, birth or other status." art. 26. The International Convention on the Elimination of All Forms of Racial Discrimination defines "racial discrimination" to mean:

> Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, or human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. U.N. 600 U.N.T.S. 195 (entered into force Jan. 4, 1969) art. 1(1).

Under these standards, now universally accepted, the failure to compensate the Ogura family Petitioners and other interned Japanese Latin Americans because they were not from the United States, but had been kidnapped and brought to this country against their will, constitutes on-going discrimination on the basis of race and national origin.

C. Well-Established Rules of Statutory Construction Dictate That Courts Construe The Civil Liberties Act of 1988 In Light of The United States' International Obligations

Article VI of the Constitution of the United States provides that the Constitution, the laws made pursuant to

it, and "all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land." U.S. CONST. art. VI, cl. 2. The Supreme Court stated in 1900 in *The Paquete Habana* that:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. 175 U.S. 677, 700 (1900) (citing *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215).

The Restatement (Third) of the Foreign Relations Law of the United States says that "[i]nternational law is law like other law, promoting order, guiding, restraining, regulating behavior. . . . It is part of the law of the United States, respected by Presidents and Congresses, and by the States, and given effect by the courts." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. I, ch. 1 (1987).

As recognized by Chief Justice Rehnquist, "it has been a maxim of statutory construction since the decision in *Murray v. The Schooner Charming Betsy*, [6 U.S. 64, 118 (1804)] that 'an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . . " *Weinberger v. Rossi*, 456 U.S.

25, 32 (1982); *see also Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ("There is . . . a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action. . . . "); *Garcia-Mir v. Meese*, 788 F. 2d 1446, 1453 (11th Cir. 1986) ("To the extent possible, courts must construe American law so as to avoid violating principles of public international law.") (citing *Murray v. The Schooner Charming Betsy*, 6 U.S. at 118).

In enacting the Civil Liberties Act of 1988, Congress manifested neither an awareness that it might be abrogating the United States' treaty obligations or customary international law, nor any desire to do so. In fact, Congress' explicitly stated purposes were to acknowledge and apologize for the internment of persons of Japanese descent during World War II; to prevent the recurrence of racially-motivated rights violations; and to enhance the credibility of the United States in its efforts to persuade other nations not to condone violations of human rights and international law. 50 U.S.C. § 1989.

Thus, it is most reasonable for this Court to interpret the CLA in accordance with binding obligations of international law and allow Petitioners an effective remedy for the violations of international law that they have been subjected to for over fifty years.

D. Failure To Provide Petitioners Relief Would Give Impunity to Violations of International Law and Risk Harming The United States' Interests

The plight of the Japanese Latin Americans, as well as that of other persons of Japanese descent whose internment has not been redressed by the U.S. government, has slowly been coming to the attention of the American public and the international community. Testimony about the Japanese Peruvian internment was presented to the

Commission on Wartime Relocation and Internment of Civilians, established by Congress in 1980, and resulted in acknowledgment of the program in the Commission's final report. See Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied (1982), Appendix D. The outcome of *Mochizuki v. United States*, 43 Fed. Cl. 97 (1999), has been followed with interest throughout the world. Testimony about the war crimes committed by the United States, and the need for redress, has been presented to the United Nations' Commission on Human Rights. International Educational Development Submission of March 1998 to 54th Session of the United Nations Commission on Human Rights. Whether the United States government likes it or not, the matter is now before the court of international opinion.

Compensation for the victims of World War II war crimes has become a topic of widespread interest, and the U.S. government has been a major player in reparations movements, particularly the effort to compensate for actions of the Nazis. In Stuart Eizenstat's words, "[t]his can be a healing process, which can strengthen each of our countries and bring this century to a close on a high note of justice." Barry Schweid, *39 Nations Seek Art Looted by Nazis*, AP, July 1, 1998. But the United States looks hypocritical in the face of its refusal to meaningfully compensate all those interned because of their Japanese descent. It diminishes U.S. credibility and also devalues international law in ways we may not fully recognize for a long time.

The effectiveness and credibility of international law rests on the recognition it receives from the governments of the world, and when a government as powerful as the United States refuses to take it seriously, the stage is set for other governments – and non-governmental groups, including the "terrorist" organizations frequently

denounced by the United States – to ignore international law at will.

Ironically, one of the stated purposes of the CLA is to "make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations." 50 U.S.C. § 1989. The exclusion of Petitioners and other Japanese, Japanese American, and Japanese Latin American internees from its provisions on the basis that they were here legally but not as permanent residents, were born into internment after an arbitrary cut-off date, or are now deemed to have been "illegal aliens" because they were kidnapped and brought here from Latin America, ignores the entire realm of international humanitarian and human rights law. If viewed only in quantitative terms, this could, perhaps, be dismissed as a small incident. But it is difficult to see how the U.S. government's resolution of it could be perceived by anyone, inside or outside of the United States, as reflecting anything but disdain for international law and human rights. As such, it sends a stark message, one that directly contradicts the purpose of the Civil Liberties Act and undermines the credibility of the United States in protesting violations of international law and human rights by other nations.

CONCLUSION

United States federal courts are increasingly being viewed as an effective forum for the enforcement of international law. However, if they are perceived as callously disregarding international law when U.S. violations, particularly undisputed violations dating from World War II, are at issue, the credibility of the U.S. judiciary will be severely diminished.

For all of these reasons, amici urge this Court to grant Petitioners' request for a writ of certiorari. This will

not only comport with long-standing jurisprudence regarding the enforcement of international law in our courts, but will also assure other nations, nations carefully watching our handling of World War II redress cases, that we take international law seriously and can be entrusted with the enforcement of the rights we advocate throughout the world.

Dated this 12th day of July, 2001.

Respectfully submitted,

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